FILE COPY

Office - Supreme Cou
FILED
JUL 18 19
CHARLES ELMORE
C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

DOCKET No. 97

THE UNITED STATES, *Petitioner*

vs.

PERCY K. HUDSON

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BERNHARD KNOLLENBERG,
Counsel for Respondent.

LORD, DAY & LORD,
HERBERT BROWNELL, JR.,
HARRY J. RUDICK,
Of Counsel.

SUBJECT INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Argument	2
1. The decision of the Court below is correct	2
a. The present tax is not an income tax, but even if it were, its retroactive provision would be unconstitutional	3
b. In so far as the silver profits tax applied to transactions like the present, dealing with silver which had been purchased prior to the effective date of the tax, the tax was palpably a revenue and not a monetary measure	5
2. The writ should be denied since there is no conflict of decisions and the matter involved is not of outstanding public importance	6
Conclusion	7

CITATIONS.

Cases:

Cooper *v.* United States, 280 U. S. 409	4, 6
Helvering *v.* Helmholz, 296 U. S. 93	2
Milliken *v.* United States, 283 U. S. 15	2, 6
Nichols *v.* Coolidge, 274 U. S. 531	2, 6, 7
Untermyer *v.* Anderson, 276 U. S. 440	2, 6, 7

PAGE

Statutes:

Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 23 (c) ---------- 3, 4

Silver Purchase Act, c. 674, 48 Stat. 1178 ---------- 5

Miscellaneous:

78 Cong. Rec., p. 9209 ---------- 5

Treasury Department Ruling: I. T. 2899, C. B., June 1935, p. 67 ---------- 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

DOCKET NO. 97

THE UNITED STATES, *Petitioner*

vs.

PERCY K. HUDSON

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Opinion Below.

The opinion of the Court of Claims (R. 5) is reported in 12 F. Supp. 620. Supplemental opinion (R. 9) denying motion for new trial is reported in 13 F. Supp. 640.

Jurisdiction.

The judgment of the Court of Claims was entered on November 4, 1935. The order of the Court of Claims overruling the motion for a new trial was entered on March 2, 1936. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Statement of the Case.

The statement of the case contained in the petitioner's brief (pp. 2-3) is satisfactory to the respondent.

Argument.

The respondent submits that the petition for a writ of certiorari should be denied for the reasons that: (1) the decision of the Court below was correct and (2) there is no conflict of decisions and the matter involved is not of outstanding public importance. These points will be discussed in the order named.

1. The decision of the Court below was correct.

The Court below held that the retroactive feature of the silver tax of 1934 was unconstitutional under the decisions of this Court in *Untermyer* v. *Anderson,* 276 U. S. 440, dealing with the retroactive Federal gift tax of 1924 and *Nichols* v. *Coolidge,* 274 U. S. 531, dealing with a retroactive provision of the 1918 Federal Estate Tax Law. Cf. *Helvering* v. *Helmholz,* 296 U. S. 93, dealing with a possibly retroactive provision of the 1926 Federal Estate Tax Law.

The Court below pointed out that this Court had said in *Milliken* v. *United States,* 283 U. S. 15, that the *Untermyer* and *Coolidge* cases established the principle that, where the nature and amount of the challenged tax burden could not have been understood and foreseen by the taxpayer at the time of the particular act which was made the occasion of the tax, the tax is so arbitrary as to constitute a denial of due process of law contrary to the Fifth Amendment of the Constitution of the United States, and that the tax challenged in the present case was a tax of that character.

The petitioner contends that the *Untermyer* and *Coolidge* decisions are not applicable to the present case on the grounds that: (a) the present tax is an income tax, and

the principle established by these decisions does not apply to income taxes; and (b) the retroactive tax in question was an exercise of Congress' power to regulate currency and is supportable as such; even though it might be unconstitutional if looked at primarily as a revenue measure.

The respondent's answers to these allegations are that (a) the silver tax is not an income tax; but, even if it were, its retroactive provision would be unconstitutional; and (b) in so far as the silver tax applied to transactions like the present, dealing with silver which had been purchased prior to the effective date of the tax, the tax was palpably a revenue, not a monetary, measure.

The grounds in support of these points will be discussed in the order named:

a. *The present tax is not an income tax, but even if it were, its retroactive provision would be unconstitutional.*

The grounds for the position that the silver tax is a stamp tax, not an income tax, are adequately stated by the Court below (R. 7), as follows:

> "the tax is specifically designated as a stamp tax, is paid by means of stamps, the Government itself has administered the act as a stamp tax, and a Treasury decision has been promulgated to the effect that the amount of this tax was deductible in determining the net income of the taxpayer."*

Conceding, however, for the sake of argument, that the silver profits tax is an income tax, it does not follow that the

---

* The Treasury Decision referred to is *I. T. 2899*, June 1935 Cumulative Internal Revenue Bulletin, page 67, construing the provision of Section 23(c) of the 1934 Act permitting the deduction, in computing net taxable income, of "taxes paid or accrued within the taxable year, except—(1) Federal income, war-profits, and excess-profits taxes." This Decision holds that the silver tax is a stamp tax, not an income tax, and is, therefore, deductible.

retroactive application of this tax is constitutional. The decision of this Court in *Cooper* v. *United States,* 280 U. S. 409, in alleged support of a general rule that income taxes may be imposed retroactively, does not support so extensive a proposition. This Court did indeed hold that the particular retroactive feature of the Revenue Act of 1921, which was under consideration in the *Cooper* case, was constitutional; but this Court did not hold, nor, we believe, intend to hold, that retroactive income taxes, even if arbitrary or palpably unreasonable, would not violate the Fifth Amendment. This Court concluded its opinion in the *Cooper* case with the observation that it could find nothing "unusual, arbitrary or capricious" in the provision of the taxing act there involved. Accordingly, we believe that this Court, had it found such provision to be palpably unreasonable or arbitrary, would not have sustained its validity.

That the tax involved in the present case, if construed to be an income tax, as contended by the petitioner, would be palpably unreasonable and unjust is apparent from consideration of the following facts: In determining statutory net income, for the purpose of computing income tax under the Revenue Act of 1934, taxpayers are permitted to deduct from gross income, stamp taxes, but are not permitted to deduct income or excess profits taxes (Sec. 23(c)). Consequently, in the case of a taxpayer like the respondent, having a statutory net income of over $100,000, the tax on the silver profits involved in the present case would total 106%—52% surtax, 4% normal tax and 50% silver profits tax. We believe that this Court would not hold valid such a worse than confiscatory tax.

b. *In so far as the silver profits tax applied to transactions like the present, dealing with silver which had been purchased prior to the effective date of the tax, the tax was palpably a revenue and not a monetary measure.*

The petitioner argues that the Silver Purchase Act was part of a unified program looking to the regulation of the currency of the nation and the development of its monetary system. This is conceded. It is also conceded that a tax on the profits from silver sales was an appropriate supplement to this program. This, however, does not establish the proposition that the *retroactive feature* of the tax was justified as an essential auxiliary to the Government's monetary policy. In the first place, it is highly improbable that the imposition or non-imposition of a tax amounting to approximately $400,000—this is the amount indicated by petitioner on page 4 of his brief to be involved in cases similar to the present one—would have any appreciable effect upon the monetary system of the country. In the second place, the President, in outlining the Government's monetary policy, did not recommend that the silver tax be made retroactive. The retroactive feature of the tax was initiated by Congress itself to "reimburse the Government for the increase which its action might bring to the price of silver".

The purpose of the Silver Tax Act was stated in the President's message as follows:

> "to increase the amount of silver in our monetary stocks with the ultimate objective of having and maintaining one-fourth of their monetary value in silver and three-fourths in gold." (78 Cong. Rec. 9209.)

In view of the President's policy (announced May 22, 1934) of having the United States gradually acquire silver,

the Government was, of course, desirous of curbing future competitive *buying* of silver by individual traders. It is obvious that the *selling of silver already owned* would aid, not interfere with, the President's announced policy of increasing the Government's stock of silver. But Congress did not limit the tax to profits on silver purchased subsequent to May 22 or even May 15. The tax applied regardless of the date of purchase. A tax on the profits from sales of silver already on hand was a revenue, not a monetary, measure.

All of the silver which the respondent sold was acquired by him prior to May 15, 1934 and was owned by him at the time the retroactive tax took effect. Consequently, if the retroactive feature of the tax had been devised as a monetary measure, rather than as a revenue raising measure, no tax would have been imposed on respondent's silver profits.

2. **The writ should be denied since there is no conflict of decisions and the matter involved is not of outstanding public importance.**

Petitioner urges that the decision of the court below is in conflict with principles enunciated by this Court in *Cooper* v. *United States,* 280 U. S. 409, and *Milliken* v. *United States,* 283 U. S. 15. However, both of these cases involved retroactive features of *income tax* legislation. As previously stated the present tax is not an income tax but an entirely novel and different tax. The case is, therefore, controlled by the principles set forth in the *Untermyer* and *Coolidge* cases, *supra,* which this Court distinguished from the *Cooper* and *Milliken* decisions in its respective opinions in the latter two cases.

The present case involves a principle which has already been passed upon by this Court in the *Untermyer* and *Coolidge* cases, to wit: the power of Congress to enact retroactive excise tax legislation of a novel character. As stated by the Court below, its conclusion can affect only a very few cases so far as the silver act is concerned; and, since the decision appealed from does not affect sales of silver made after the enactment of the law, the matter involved is not of outstanding public importance. The writ should, therefore, be denied.

Conclusion.

We submit that the decision below is correct, that there is no conflict of authority, that the question is not one of outstanding public importance, and that the petition should be denied.

Respectfully submitted,

BERNHARD KNOLLENBERG,
Counsel for Respondent.

LORD, DAY & LORD,
HERBERT BROWNELL, JR.,
HARRY J. RUDICK,
Of Counsel.

CPY2267